UNITED STATES
ENVIRONMENTAL PROTECTION AGENCY

BEFORE THE ADMINISTRATOR

IN THE MATTER OF:	)	
	)	
Service Oil, Inc.,	)	**Docket No. CWA-08-2005-0010**
	)	
Respondent	)	

ORDER ON MOTIONS IN LIMINE,
MOTIONS TO SUPPLEMENT AND AMEND PREHEARING EXCHANGE,
AND MOTION TO COMPEL DISCOVERY

I. Procedural Background

The Complaint in this matter, filed on April 26, 2005 by the United States Environmental Protection Agency Region 8 under Section 309 of the Clean Water Act (CWA), alleges in Count 1 that Respondent violated Section 301(a) of the CWA and its implementing regulations, by failing to obtain, on or before the date it commenced construction activities at its facility, a North Dakota Pollutant Discharge Elimination System (NDPDES) permit authorizing storm water discharges from its facility. The Complaint alleges in Count 2 that after Respondent obtained the permit, it failed to conduct storm water inspections at the frequency required by the permit, and/or to maintain inspection records on-site. The penalty proposed in the Complaint for the two alleged violations is $80,000. Respondent answered the Complaint, the parties filed prehearing exchanges, and several motions were filed by the parties, some of which are addressed herein. On March 7, 2006, an Order was issued granting Complainant's Motion for Accelerated Decision on liability for Count 2, and denying it as to liability for Count 1 and as to penalties.

On November 22, 2005, Complainant filed a Motion for Substitution of Complainant's Exhibit 23 and Amendment to the Prehearing Exchange, and a Motion to Compel Additional Discovery for the Statutory Factor Ability to Pay. Respondent submitted a response to the Motion to Compel on January 5, 2006. Respondent submitted a Motion in Limine to Exclude Rebuttal Evidence on December 14, 2005, to which Complainant filed an Opposition on December 27, 2006. Also on December 14, 2005, Respondent submitted a Motion to Supplement Its Prehearing Exchange to Add Dennis Walaker as a Witness and Brief in Support of Motion (collectively, Motion to Supplement). On December 15, 2005, Complainant submitted a Motion in Limine to Exclude Testimony and Documents Listed in Respondent's Prehearing Exchange ("C's First Motion in Limine"), to which Respondent submitted an Opposition on January 3, 2006, and Complainant filed a Reply thereto on January 17, 2006. On December 28, 2005, Complainant submitted a Response in Opposition to Respondent's Motion to Supplement and Complainant's Motion in Limine (collectively, "C's Second Motion in

Limine"). On January 12, 2006, Respondent filed a Response Brief in Opposition to Complainant's Second Motion in Limine, simply incorporating by reference its Motion to Supplement.

II. Complainant's Motion for Substitution of Complainant's Exhibit 23 and Amendment to the Prehearing Exchange

In its Motion for Substitution of Complainant's Exhibit 23 and Amendment to the Prehearing Exchange, Complainant seeks to substitute a document entitled "Penalty Justification," attached to the Motion for a document of the same title marked Exhibit 23 in its Prehearing Exchange. Complainant explains that the attached document includes footnote designations that Exhibit 23 is missing, apparently inadvertently omitted during editing of the document. Also in its Motion, Complainant seeks to delete the designation of the unnamed rebuttal expert witness, on the basis that Complainant now does not intend to call such a witness. The Motion states that Respondent does not object to the filing of the Motion, and Respondent has not filed any response to the Motion. Accordingly, the Motion for Substitution of Complainant's Exhibit 23 and Amendment to the Prehearing Exchange is **GRANTED.**

III. Complainant's Motion to Compel

Complainant's Motion to Compel Additional Discovery for the Statutory Factor Ability to Pay,[1] includes, in the alternative, a Motion to Preclude Respondent from Offering Any Evidence of its Inability to Pay at Hearing. Therein, Complainant requests that Respondent be compelled to explain the legal and factual basis for its claimed inability to pay the proposed penalty, and to produce documents in support of its claim. In the alternative, Complainant requests that Respondent be ordered to state on the record or by stipulation that it has the ability to pay the proposed penalty. In support, Complainant points out that in its Answer, Respondent had alleged that payment of the proposed penalty would require Respondent to borrow money from a bank. The Prehearing Order, issued in this matter on July 19, 2005, required Respondent, if it takes the position that it is unable to pay the proposed penalty, to provide a narrative statement and copy of any documents in support of its position. Complainant points out that Respondent failed to provide either a narrative statement or any documents in support. Complainant asserts that by letter it requested financial information from Respondent, but Respondent sent a letter in return refusing to provide the information. Complainant requests that an order be issued compelling Respondent to provide the financial information requested in the letter.

In its response, Respondent states that it will not raise "ability to pay" as an issue at the

[1] The factors set forth in Section 309(g)(3) of the Clean Water Act for determining a penalty include the respondent's "ability to pay."

hearing in this case, will not argue that the penalty should be eliminated or reduced on the basis of this factor, and will not offer evidence on that factor.

Accordingly, since Respondent has complied with Complainant's alternative request in its Motion to Compel, it is **DENIED AS MOOT**.

IV. Respondent's Motion in Limine to Exclude Rebuttal Evidence

Respondent moves for an order excluding all of Complainant's rebuttal evidence relating to its Rebuttal Prehearing Exchange, on grounds stated in its attached letter to Complainant's counsel, dated October 31, 2005, that: (1) it was not served on Respondent in a timely manner, (2) Complainant listed an "unknown expert witness" in its Rebuttal Prehearing Exchange, and (3) that parts of Complainant's proposed exhibits 28 and 29 are redacted as settlement information, but Complainant has not stated what was redacted, so Respondent cannot evaluate whether it is privileged settlement information. As to the first ground, Respondent argues that the Certificate of Service on Complainant's Rebuttal Prehearing Exchange states that it was served on the due date, but that the postmark on the envelope shows that it was actually served the next day. Respondent states that it was waiting until it received the Rebuttal to respond to Complainant's request for additional detail as to Respondent's proposed witness testimony.

In its Response, Complainant asserts that on the due date, the Rebuttal Prehearing Exchange was filed with the Regional Hearing Clerk, and was hand-carried to the EPA's mail room, but unfortunately did not reach the U.S. Mail until the next day. Complainant argues that Respondent has not shown any harm or undue prejudice by the one-day delay in service, and has not cited any legal authority in support of the severe sanction of excluding the Rebuttal. In a letter to Respondent, dated November 23, 2005, attached to its Response, Complainant explains that its practice in mailing documents is to deliver the document to EPA's mail room by 4:30 p.m. on the day of filing, and that EPA relies on its mail room to ensure all mail received by 4:30 is sent out the same day. Complainant asserts that it delivered the Rebuttal Prehearing Exchange to the mail room before 4:30 on the date it was due. *See*, Response, Exhibit A.

As to the unnamed proposed witness, Complainant states in the letter that it now does not believe a rebuttal expert witness is necessary, and as discussed above, moved to amend its Rebuttal Prehearing Exchange to delete the witness. Complainant argues that the settlement information referenced in the Rebuttal Prehearing Exchange consists of settlements reached in other cases, which is irrelevant and immaterial to this proceeding, and a proposed settlement amount in this proceeding, which is confidential and not admissible in this proceeding under 40 C.F.R. § 22.22(a)(1) (evidence relating to settlement which would be excluded in Federal courts under Federal Rule of Evidence 408 is not admissible).

Assuming *arguendo*, without deciding, that Complainant's service on Respondent was deemed to be untimely, Complainant's point is well-taken that Respondent has not demonstrated any prejudice from the one day delay, particularly given that the hearing is scheduled to

commence six months after the Rebuttal Prehearing Exchange was filed.

The proposed exhibits with redacted information, and the proposed unnamed expert witness, are not sufficient grounds to exclude the Rebuttal Prehearing Exchange. Complainant has amended its Rebuttal Prehearing Exchange to delete the proposed unnamed witness. Complainant's Prehearing Exchange Exhibits ("C's Exs") 28 and 29 are charts listing several facilities, including Respondent, that include columns marked "EPA BEN" (calculation of the respondent's economic benefit of noncompliance) and "EPA Bottom Line Penalty," which would appear to be EPA's bottom line settlement amounts for each facility. The spaces for each facility in these two columns appear blank, or redacted. A review of the charts indicates that the redacted information is either inadmissible settlement information as to this case or is settlement penalty amounts in other cases, and thus is irrelevant to this proceeding. *Briggs & Stratton Corp.* 1 E.A.D. 653, 666 (JO 1981)(comparing penalties assessed by an administrative law judge after a hearing with penalties assessed after negotiation with the enforcement staff "are difficult, if not impossible, to make"). Therefore there is no need to exclude any part of the Rebuttal Prehearing Exchange.

V. Respondent's Motion to Supplement and Complainant's Motion in Limine as to Proposed Witness Mr. Walaker

Respondent moved to supplement its Prehearing Exchange to add Mr. Dennis Walaker as a proposed witness to testify as to the statutory penalty determination factors of "nature, circumstances, extent and gravity of violations," and specifically, whether there was a high potential for stormwater runoff of materials from Respondent's facility during the time Respondent did not have a stormwater permit, as alleged by Complainant in regard to Count 1 (Complaint p. 6). Respondent claims that it is not liable for the violation alleged in Count 1 because there was no "discharge of a[] pollutant" from its facility within the meaning of Section 301(a) of the CWA, where the area is very flat and Respondent removed soil creating a bowl or pond, which would prevent any stormwater runoff except in the event of a catastrophic flood. Respondent claims further than precipitation records indicate that the area did not experience a catastrophic flood during the time period at issue in Count 1. Respondent asserts that Mr. Walaker is the head of the Public Works Department for the City of Fargo, that he has experience in dealing with catastrophic flooding issues involving the City of Fargo and the Red River of the North, and that "there is no one in the locale of Respondent's facility who has a better handle on catastrophic flooding issues in this area, than does Dennis Walaker." Motion to Supplement at 1, 2.

In response, Complainant opposes supplementation of Respondent's Prehearing Exchange with Mr. Walaker as a proposed witness, and if supplementation is allowed, Complainant moves to exclude his testimony. Complainant disagrees with Respondent's claim that runoff from Respondent's site would only occur in the event of a catastrophic flood, and points to evidence in its Prehearing Exchange in support of its position. Therefore, Complainant asserts that Mr. Walaker's testimony regarding flood issues is irrelevant, immaterial and of no or

little probative value under 40 C.F.R. § 22.22(a). Complainant points out that Respondent has not identified Mr. Walaker as either a lay or expert witness, and without more information, his testimony is unreliable, and Complainant will be at a disadvantage at hearing and subject to surprise. Complainant argues that Mr. Walaker's testimony would be unduly repetitious because Mr. Nordan J. Lunde is listed as Respondent's proposed expert witness to testify as to his review of precipitation records, that a Hurricane Katrina-like rain of 18" to 30" would be required for stormwater to flow out from the "bowl" or "pond" on the site, and the probability that storm water entered the drop inlets on the site. C's Second Motion in Limine, Exhibit B. Complainant asserts that Mr. Walaker lacks first-hand knowledge of the facts at issue and lacks the appropriate skill, knowledge, training, experience or education to testify as to storm water runoff as related to the facility.

The Consolidated Rules of Practice ("Rules") provide that "[t]he Presiding Officer shall admit all evidence which is not irrelevant, immaterial, unduly repetitious, unreliable, or of little probative value . . . ." 40 C.F.R. § 22.22(a)(1). The Rules do not refer to motions in limine, and do not address the subjects of lay and expert testimony. In the absence of administrative rules on a subject, it is appropriate to consult Federal court practice, Federal Rules of Civil Procedure or the Federal Rules of Evidence as guidance in analogous situations. *See, Carroll Oil Co.,* RCRA (9006) Appeal No. 01-02, slip op. at 19, 10 E.A.D. ___ (EAB, July 31, 2002); *Asbestos Specialists, Inc.*, 4 E.A.D. 819, 827 n. 20 (EAB 1993); *Wego Chemical & Mineral Corp.*, 4 E.A.D. 513, 524 n.10 (EAB 1993).

In Federal court practice, a motion in limine "should be granted only if the evidence sought to be excluded is clearly inadmissible for any purpose." *Noble v. Sheahan,* 116 F.Supp. 2d 966, 969 (N.D. Ill. 2000). Motions in limine are generally disfavored. *Hawthorne Partners v. AT&T Technologies, Inc.*, 831 F. Supp. 1398, 1400 (N.D. Ill 1993). If evidence is not clearly inadmissible, evidentiary rulings must be deferred until trial so questions of foundation, relevancy, and prejudice may be resolved in context. *Id*. at 1401. Thus, denial of a motion in limine does not mean that all evidence contemplated by the motion will be admitted at trial. Rather, denial of the motion in limine means only that without the context of the trial the court is unable to determine whether the evidence in question should be excluded. *United States v. Connelly*, 874 F.2d 412, 416 (7th Cir. 1989).

Evidence as to the penalty issue must be relevant and of probative value as to the criteria set forth in the statute for determining a penalty. In its prehearing exchange, or in moving to supplement the prehearing exchange, a party is required to provide a brief narrative summary of the witness' expected testimony (40 C.F.R. § 22.19(a)(2)(i)). The relevancy, materiality, repetitiousness, reliability and/or probative value of the proposed testimony may or may not be apparent from the summary of expected testimony.

According to Rules 602 and 701 of the Federal Rules of Evidence, lay testimony must be based on personal knowledge or observation, and any opinion testimony of lay witnesses must be limited to opinions or inferences which are rationally based on the perception of the witness. Lay witnesses may "offer an opinion on the basis of relevant historical or narrative facts that the

witness has perceived." *MCI Telecomm. Corp. v. Wanzer*, 897 F.2d 703, 706 (4th Cir. 1990)(bookkeeper could testify as a lay witness as to her calculation of profits on contracts where calculations were based on account records she kept).

Respondent asserted that Mr. Walaker's testimony would address certain criteria set forth in CWA Section 309(g)(3) (33 U.S.C. § 1319(g)(3)), namely, the nature, extent and gravity of the violations, and specifically, as to catastrophic flooding in the Fargo area. The question is whether the description of his proposed testimony establishes that it is clearly inadmissible for any purpose with respect to this case. Respondent has neither identified Mr. Walaker as an expert witness nor provided a resume or curriculum vitae, as the Prehearing Order requires to be submitted for proposed expert witnesses. Therefore, and from the information provided by Respondent, it appears that Respondent intends for him to testify as a lay witness as to his personal observation or knowledge of precipitation and flooding in the Fargo area. Respondent has provided precipitation data (Respondent's Prehearing Exchange Exhibit ("R's Ex") 20) and an expert witness, Mr. Lunde, to testify as to his review thereof and as to the Respondent's facility. There is no indication that Mr. Walaker is familiar with or has observed Respondent's facility. Therefore, Mr. Walaker's testimony may be unduly repetitious, irrelevant, immaterial or of little probative value as to the issues in this case. However, it cannot be determined at this point in the proceeding that it is clearly inadmissible for any purpose.

Thus, Respondent's Motion to Supplement with regard to Mr. Walaker is **GRANTED** and the Complainant's Motion In Limine to Exclude Testimony of Mr. Walaker is **DENIED.** *Nevertheless,* Complainant is entitled to prepare for a hearing and not be the subject of surprise. Therefore, in accordance with the Prehearing Order and with 40 C.F.R. § 22.19(a)(2) and (f), if Respondent intends Mr. Walaker to offer lay testimony, then Respondent must file a supplement to its Prehearing Exchange stating that he is a proposed fact witness and summarizing the facts to which he is expected to testify. If, on the other hand, Respondent anticipates offering Mr. Walaker as an expert witness at the hearing, Respondent shall file a supplement to its Prehearing Exchange identifying Mr. Walaker as an expert witness, and providing his resume or curriculum vitae. If, based on this information in the supplement, Complainant contends that Mr. Walaker's proposed testimony is clearly inadmissible for any purpose, it may renew its motion in limine.

VI. Complainant's Motion in Limine to Exclude Testimony and Documents Listed in Respondent's Prehearing Exchange

In its Prehearing Exchange (at 2-3), Respondent listed several proposed fact witnesses who are employed by the North Dakota Department of Health (Department of Health), namely: Randy Kowalski, Gary Bracht, Dennis R. Fewless, Dallas Grossman, and Abbie Krebsbach, and stated that each is to testify "about the site inspection of Respondent's facility in October of 2002 and what has transpired vis-a-vis the North Dakota Department of Health and Respondent's facility subsequent to that inspection." According to Complainant, upon request from Complainant, Respondent provided a more detailed description of their testimony, including the following:

1. The stormwater inspections done in the Fargo-West Fargo area in October of 2002, the results and reports of these inspections, and specifically the results and report of the site inspection at Respondent's facility;

2. Respondent's response to the inspection, and stormwater permitting activities with the Department of Health on behalf of Respondent;

3. The Department of Health's response to Respondent's application for a stormwater permit and the practice of the Department not to send a stormwater permit to persons who apply for one;

4. The Department of Health's follow-up as to Respondent's facility and permit issues, and its communication with Respondent and Respondent's attorneys;

5. EPA's "consultation" with the Department of Health, what it consisted of, and how shocked the Department was when it learned that EPA is seeking an $80,000 penalty against Respondent; and

6. Testimony as to C's Exs 1, 3 through 11, 23, 25 through 29; and R's Exs 1 through 7, 10, 14 and 15.

C's First Motion in Limine at 4. In general, Complainant seeks to exclude testimony of these witnesses, the results and reports of the inspections of the other facilities, and certain other exhibits in Respondent's Prehearing Exchange which relate to penalties or settlements in other cases. The parties arguments are set forth below.

A, Testimony as to State Inspection of Respondent's Facility

First, Complainant seeks to exclude the testimony of proposed witnesses Randy Kowalski, Gary Bracht, Dennis R. Fewless, and Dallas Grossman ("State witnesses") pertaining to their observations of Respondent's site as irrelevant, immaterial and of little probative value on the basis that they lack first hand knowledge of the facts.

In response, Respondent argues that each of these witnesses have first-hand knowledge of the permitting process, Respondent's permit application and attempts to comply with the permit, and Respondent's status as a non-contractor (not being in the construction business). Respondent asserts that they would testify as to the nature, circumstances, extent and gravity of the violation or violations, and degree of Respondent's culpability. Respondent asserts that it has no intention of eliciting repetitious testimony from the witnesses. Respondent emphasizes that the Department of Health issued the permit to Respondent, was involved in the inspection which prompted this case, was involved in the permitting process and Respondent's subsequent compliance efforts, and never provided Respondent with the actual permit which set forth the requirement, which Respondent violated, for weekly inspections.

In its Reply, Complainant asserts that the only relevant testimony regarding the October 24, 2002 inspection is that of Ms. Krebsbach. The testimony of the other State witnesses is irrelevant because they were not involved in the inspection of Respondent's facility or the Respondent's failure to conduct inspections and keep records thereof. They were not presented as expert witnesses, and had limited experience as they had not brought any stormwater actions before the October 2002 inspections. As lay witnesses, they can only testify from personal knowledge or observation. Complainant argues that the stormwater regulations apply to any owner or operator of a facility or activity subject to regulation under the NPDES program. 40 C.F.R. §122.2. Respondent was the owner of the facility and operator of the operator of the construction activity, Complainant asserts. Respondent has admitted and stipulated that it was the owner/operator of the facility. Therefore, any testimony about Respondent's non-contractor status is irrelevant, immaterial and of little or no probative value.

Although Respondent's status as not being in the construction business would not affect liability, it may affect Respondent's culpability, as it may bear on the degree of control Respondent had over the actions or omissions constituting the violation. However, it would appear that other proposed witnesses listed by Respondent, such as Respondent's President, could testify as to Respondent's status as a non-contractor; the State witnesses' testimony may be unduly repetitious on this point.

Of course, the State witnesses cannot testify as to their personal observation of the site inspection of Respondent's facility when they did not actually observe the site, but they may be able to testify as to their personal knowledge and/or observations of other relevant facts. Complainant does not dispute that the State witnesses were involved with the permit application process, and Complainant has submitted documents in its Prehearing Exchange that wree sent from Respondent's engineer to Gary Bracht and from Dennis Fewless to Respondent. C's Exs. 3, 11. Facts regarding Respondent's efforts to obtain and comply with the permit may be relevant to statutory penalty determination factors. Testimony of State witnesses as to their observations or personal knowledge relevant to these facts, such as Respondent's efforts to inquire about, apply for, and obtain the permit, and information conveyed or not conveyed by these witnesses to Respondent concerning the permit or permit application, may be admissible in evidence. Therefore, Complainant's Motion in Limine to exclude testimony of witnesses Randy Kowalski, Gary Bracht, Dennis R. Fewless, and Dallas Grossman is **DENIED**.

B. Inspections of Other Facilities

Second, Complainant seeks to exclude the testimony of Randy Kowalski, Gary Bracht, Dennis R. Fewless, Dallas Grossman, and Abbie Krebsbach ("State witnesses") pertaining to stormwater inspections of *other* facilities in the area, as well as the results and reports of the inspections, and R's Exs. 1, 2, 3, and 4, on the basis that the testimony and exhibits relate to proposed or assessed penalties or settlements as to those facilities, and are unrelated to this case. Complainant argues that administrative case law has long established that prior settled cases are irrelevant to determination of penalties, and cites to several decisions, including *Chem Lab*

Products, Inc., FIFRA Appeal No. 02-01, 2002 EPA App. LEXIS 17 (October 31, 2002); *Chautauqua Hardware Corporation*, 3 E.A.D. 616, 626-7 (CJO 1991); and *Titan Wheel Corp. v. U.S. EPA*, 291 F. Supp. 2d 899, 933 (S.D. Iowa, 2003).

Respondent argues that these cases involve comparisons to settlement amounts in unrelated cases, and that Respondent's proposed testimony and exhibits do not involve penalties imposed in other cases, but may involve comparisons of Respondent's violations with other similar violations at other sites, which has "probative value" (the tendency of the information to prove a fact that is of consequence to the case), as to the nature, circumstances, gravity and extent of the infractions. In particular, Respondent asserts, the testimony of Ms. Krebsbach includes her observations at the October 24, 2002 inspection.

Respondent points out that C's Ex 1 is the Complainant's inspection report for the October 24, 2002 inspection, and that R's Ex 1 is the inspection notes of the Department of Health regarding the same inspection. Respondent asserts that there is a discrepancy on a relevant fact between the two exhibits, as to the concrete wash activities at Respondent's facility, which according to C's Ex 1 were draining directly into the storm drains, and which according to R's Ex 1 were being performed in areas away from sewer outlets. R's Exs 1 through 4 each include stormwater inspection and follow-up information about Respondent as well as other facilities in the Fargo area. With regard to Respondent, R's Exs 1 and 2 show details of the October 24, 2002 inspection of Respondent's facility, R's Ex 3 shows the Department sent Respondent a Letter of Apparent Noncompliance and closed the case, and R's Ex 4 shows that Respondent obtaining a permit was the reason not to refer the case to the Attorney General. The exhibits also show details of inspections and the Department's enforcement responses to the other facilities.

Complainant asserts that R's Exs 1 through 4 are internal State agency notes concerning other facilities and any comparison of these cases with the present case is irrelevant, immaterial and of little or no probative value, particularly since Respondent has not raised a "selective prosecution" defense.

In *Chautauqua Hardware*, the respondent moved for discovery of settlement agreements, final orders, opinions or other documents that explain the terms and rationale of the resolution of several other cases, to elicit information bearing on the appropriateness of the penalty proposed against it. The motion was denied on the basis that information about other cases does not have "significant probative value on a disputed issue of material fact relevant to liability or the relief sought," which is a criterion for discovery under 40 C.F.R. § 22.19(e)(1)(iii). While it is noted that the "significant probative value" standard for allowing additional discovery under Section 22.19(e)(1) differs from the standard for motions in limine, "clearly inadmissible for any purpose," the Chief Judicial Officer also broadly stated that the materials sought "cannot be used to prove a *fact* bearing on th[e] issue. What has happened in other cases can have no bearing on any factual issues in this case." 3 E.A.D. at 627. He also stated, "Nor can other EPCRA [Emergency Planning and Community Right-to-Know Act] cases be used to show that the penalty is inappropriate because it is more severe than penalties imposed in similar EPCRA

cases." 3 E.A.D. at 627 n. 14.

Since that opinion was issued, the Environmental Appeals Board (EAB) has provided more detailed discussion on the subject of considering information from other cases in administrative enforcement proceedings. In *ChemLab Products, Inc*., FIFRA App. No. 02-01, 2002 EPA App. LEXIS 17 (EAB, Oct. 31, 2002), the EAB provided the following guidance:

> The [Environmental Appeals] Board and its predecessors have consistently held, in a number of statutory contexts, that "penalty assessments are sufficiently fact- and circumstance-dependent that the resolution of one case cannot determine the fate of another." *In re Newell Recycling Co.*, 8 E.A.D. 598, 642 (EAB 1999) (ALJ did not err in failing to address penalties assessed in other cases when calculating penalty amount in instant case), *aff'd*, 231 F.3d 204 (5th Cir. 2000) (citations omitted). This holding is based on three foundational principles.
>
> First, the environmental statutes EPA is charged with administering typically set forth a variety of penalty factors that must be carefully evaluated in assessing administrative penalties. * * * * As applied to a particular case, these generic penalty factors naturally become unique to that case on the basis of the evidence and testimony introduced into the administrative record. * * * * The uniqueness of the penalty inquiry is such that if the penalties assessed against two violators of the same statutory or regulatory provision are compared in the abstract simply as dollar figures, without any (or even with bits and pieces) of the unique record information that is so central to the penalty determinations themselves, then meaningful conclusions regarding the comparative proportionality or uniformity or "fairness" of the penalties cannot reasonably be drawn. *See Titan Wheel*, slip op. at 11, 10 E.A.D. __ ("comparing penalties between disparate cases does not account for the multiplicity of factors" that may affect a penalty determination). Any inquiry as to alleged unfairness, based on the Agency's actions in purportedly similar cases, would necessarily entail comprehensive, detailed comparisons of all the unique facts and circumstances of such cases.
>
> This ties into the second rationale for the Board's holding, which is the principle of judicial economy. The Consolidated Rules of Practice . . . encourage the "*efficient*, fair and impartial adjudication of issues," 40 C.F.R. § 22.4(a)(2), (c)(10) (emphasis added), thereby "demonstrating a solicitude for judicial economy." *In re Carroll Oil Co.*, RCRA (9006) Appeal No. 01-02, slip op. at 22 (EAB July 31, 2002), 10 E.A.D. ___ * * * *. Obviously, the Board and ALJs routinely decide cases involving highly technical issues and lengthy, detailed administrative records, so these types of fact- and analysis-intensive burdens are not unknown to them. However, one can easily imagine the increase in burdens presented to these decisionmakers if every respondent in a penalty case were to think it advantageous to submit comparative penalty information on a case or cases allegedly "similar" to its own. The Board and ALJs would soon be awash in a sea of minutiae pertaining to cases other than the ones immediately before

them. *See, e.g., Titan Wheel*, slip op. at 6-7, 11-14, 10 E.A.D.___ (attempt to introduce large number of unrelated penalty assessments issued by EPA and State of Missouri); *Newell Recycling*, 8 E.A.D. at 642-43 (offer of data on other TSCA penalty cases that have come before Board or Board predecessors); *Chautauqua*, 3 E.A.D. at 626-27 (seeking discovery of information on twenty-one unrelated EPCRA cases); *Briggs & Stratton*, 1 E.A.D. at 665-66 (submitting information on approximately forty other cases). For this among other reasons, we have consistently declined to pursue this avenue of inquiry.

The third rationale for disfavoring case-to-case comparisons is the general principle that "'unequal treatment is not an available basis for challenging agency law enforcement proceedings.'" *In re Spang & Co.*, 6 E.A.D. 226, 242 (EAB 1995) (quoting Koch, 1 *Administrative Law and Practice* § 5.20, at 361 (1985)); *see* Charles H. Koch, Jr., 2 *Administrative Law and Practice* § 5.30[3][a] (2d ed. Supp. 2001-2002). This principle classically arises in the context of selective enforcement . . ., but it is equally applicable in the penalty context. * * * * (citations omitted); *accord Newell Recycling Co. v. U.S. EPA*, 231 F.3d 204, 210 n.5 (5th Cir. 2000) (administrative penalty need not resemble those assessed in similar cases); *Cox v. USDA*, 925 F.2d 1102, 1107 (8th Cir.) (where a sanction is warranted in law and fact, it will not be overturned simply because it is more severe than sanctions imposed in other cases), *cert. denied*, 502 U.S. 860 (1991).

The inappropriateness of comparing settled versus litigated cases has also long been established. EPA administrative case law holds that penalties assessed in litigated cases cannot profitably be compared to penalties assessed via settlements. * * * * *In re Briggs & Stratton Corp.*, 1 E.A.D. 653, 666 (CJO 1981) (citations omitted). This is true as to all terms of the settlement, not just the penalty amount.

Juxtaposed against the principle that penalties should be assessed on an individual basis, without considering other similar penalty cases, is EPA's long-established policy favoring consistency and fairness in enforcement. The Agency's general enforcement policy states in this regard that "fair and equitable treatment requires that the Agency's penalties must display both consistency and flexibility." EPA General Enforcement Policy # GM-21, *Policy on Civil Penalties* 4 (Feb. 16, 1984). * * * *

The Administrative Procedure Act ("APA") acts as a further guard against arbitrariness. That statute requires that an agency's choice of sanction be rationally related to the offense committed, *i.e.*, that the chosen sanction not be arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law. APA § 10(e)(2)(A), 5 U.S.C. § 706(2)(A); *see In re Employers Ins. of Wausau*, 6 E.A.D. 735, 757-59 (EAB 1997).

The apparent tension between these two EPA policies -- one discouraging the

> examination of any case other than the one in question, and the other seemingly designed to provide a measure of equity among comparable violations -- is resolved when one understands that the penalty policies do not, by aiming for the high ideals of consistency and fairness, necessarily "suggest identical penalties in every case." *Titan Wheel*, slip op. at 10 n.14, 10 E.A.D. ___. As we recently explained in another setting, "variations in the amount of penalties assessed in other cases, even those involving violation of the same statutory provisions or regulations, do not, *without more*, reflect an inconsistency" with the EPA policy advocating fair and equitable penalty assessment. *Id.* (emphasis added). The "more" that would be needed has never been directly addressed by this Board, but the term recognizes that there may be circumstances so compelling as to justify, despite judicial economy concerns and Supreme Court precedent affirming agency penalty discretion, our review of other allegedly similar cases. In the case presently before us, such compelling information is lacking.

Thus, it cannot be concluded that information about other cases is *never* relevant to the assessment of a penalty. See, *United States v. Ekco Housewares, Inc.*, 62 F.3d 806, 816 (6th Cir. 1995)("the penalties imposed in other cases are indeed relevant"); *Sterling v. Velsicol Chemical Corp.*, 855 F.2d 1188, 1207 (6th Cir. 1988)(civil damage awards 8 to 40 times the award made in other cases held excessive, and shocked judicial conscience).[2]

In this case, there is no applicable penalty policy, and very little information provided by Complainant as to the calculation of the proposed penalty. Consequently, testimony that may shed more light on facts relevant to the penalty assessment factors may be more welcome in this case. Complainant states in its Penalty Justification that "the threat of harm and potential impact on the environment from sediment potentially discharged from [Respondent's facility] due to no permit . . . [and] for failure to conduct all required inspections is significant. . . [and] was considered in determining the gravity of the violations." C's Ex 23 at 6. Complainant lists percentages of the contribution of stormwater runoff to various impaired water bodies. *Id.* Complainant states information as to the uses and quality of the Red River. *Id.* at 2. Complainant asserts that Respondent did not have a Stormwater Pollution Prevention Plan and

---

[2] The court in *Ekco* concluded that decisions cited by the defendant did not provide meaningful guidance, and held that there was no abuse of discretion in imposing a penalty significantly higher than those imposed against others for similar violations, acknowledging that "the reasonableness of a penalty is a fact-driven question, one that turns on the circumstances and events peculiar to the case at hand." *See also, Butz v. Glover Livestock Commission Co.*, 411 U.S. 182, 187-188 and n. 6 (1973) ("employment of a sanction within the authority of an administrative agency is thus not rendered invalid in a particular case because it is more severe than sanctions imposed in other cases," and "mere unevenness in the application of the sanction does not render its application in a particular case 'unwarranted in law,'" noting government agency's practice of imposing sanctions in other administrative decisions did not support Court of Appeals' conclusion that a particular sanction was unwarranted).

had not implemented Best Management Practices (including erosion and sediment controls), leading to high potential for runoff of pollutants. *Id.*

The documents in R's Exs 1 through 4 indicate that in the Fargo area, there were violations similar to Respondent, of failure to apply for a stormwater permit and thus failure to comply with permit conditions such as Best Management Practices, to control discharge of sediment. There is a possibility that these exhibits and testimony concerning the inspections of the other facilities could have some relevance as to the likelihood that Respondent should have known to apply for a stormwater permit and to implement measures to control sediment discharge, which could affect the degree of Respondent's culpability. If Complainant produces testimony as to any impairment of the quality of the Red River as associated with stormwater potentially discharged from Respondent's facility, then Respondent's proposed testimony as to the inspections of other facilities, and/or R's Ex 1 through 4, may be relevant in rebuttal to such testimony. [3] On the other hand, enforcement actions taken, and standards, priorities and policies followed by a State agency, such as the Department of Health, may differ from those of EPA, which may tend to reduce the probative value of some information on, and particularly the resolution of, other cases investigated by the Department of Health.

It is not the purpose of this order to weigh the probative value of information as to other stormwater cases, but only to determine whether testimony as to stormwater inspections done in the Fargo-West Fargo area in October of 2002, the results and reports of the inspections, and/or R's Exs 1, 2, 3, and 4, are "clearly inadmissible for any purpose." At this point in the proceeding, such testimony and evidence cannot be determined to be "clearly inadmissible for any purpose." However, the parties are advised to heed the EAB's guidance in *ChemLab* quoted above, in preparing for the hearing in this matter.

C. State Follow-Up

Third, Complainant seeks to exclude testimony of the State witnesses pertaining to what transpired between Respondent and the Department of Health after the inspection, on the basis that it is unduly repetitive of stipulated exhibits (C's Exs 1, 3, 4, 5, 6, 8, 9, 10, 11, and R's Exs 5, 6, 7, 10, 14 and 15). Complainant asserts that the response of the Department of Health to Respondent's permit application, and the Department's practice not to send a storm water permit to applicants has been stipulated or could be if Respondent were willing. Complainant urges that it can apply the statutory factors to the stipulated exhibits without further interpretation by the

[3] In its Rebuttal Prehearing Exchange, C's Exs 27 and 28, Complainant submitted charts showing stormwater violations in other cases, and the North Dakota and EPA enforcement actions taken. Without knowing what information Complainant may rely on, or present testimony on, from those exhibits, it would be unfair at this time to exclude documents presented by Respondent (R's Exs 1 through 4) that give more detail as to other facilities' violations which are listed in documents presented by Complainant (C's Ex 27 and 28).

State witnesses.

Respondent asserts that the this testimony is crucial because the Department of Health issued the permit, Respondent applied for the permit as soon as it was notified that it needed one, Respondent's project engineer was in contact with the Department of Health, and the Respondent's prompt compliance has probative value as to statutory penalty factors of Respondent's culpability and "other matters as justice may require." The testimony is also crucial because these witnesses would testify that the Department of Health never provided Respondent with the permit, according to their practice at the time, and the violation in Count 2 is the result of Respondent not having the permit. Respondent adds that stormwater permit requirements had never been enforced in the area before the October 2002 inspections, referring to C's Ex 10. Respondent argues that local concerns are relevant to the penalty calculation, citing *Strong Steel Products, Inc.*, EPA Docket No. MM-5-2001-0006, 2003 WL 22534560 (ALJ, Order on Motions for Leave to File Amended Complaint and to Strike Defenses and Motions in Limine, Oct. 27, 2003). Respondent complains that the stipulation offered by Complainant is insufficient, and insists on an extensive stipulation including that the Department of Health never, ever provided a copy of the permit and Respondent never, ever saw a copy of the permit until seven months after the Complaint was filed.

Complainant urges that the appropriate venue for considering local concerns is in the notice and comment process required under CWA Section 309(g)(1)(A). Because the State did not submit comments, it waived its right to contest the proposed penalty, so any testimony by State witnesses on local concerns as to the calculation of the proposed penalty is irrelevant, immaterial and of little or no probative value. Complainant asserts that Respondent should have exercised due diligence and obtained a copy of the permit if it did not receive one from the Department of Health.

Respondent has described testimony as to facts that are not stipulated by the parties or shown in the stipulated exhibits. For example, Respondent may present testimony as to contacts among its engineer, the Department of Health, and Respondent's officers, managers or employees, that are not shown in C's Ex 1 (Inspection Report); C's Ex 3 (Notice of Intent from Respondent's engineer to Gary Bracht); C's Exs 4 and 5, and R's Ex 10 (letters of correspondence between Abbie Krebsbach and Respondent's engineer Brock Storrusten); C's Ex 6 and R's Exs 14 and 15 (stormwater permits); C's Ex 8 (Notice of Termination to cancel NPDES coverage from Respondent's president); C's Exs 9 and 10 (EPA's Request for Information and Respondent's response), C's Ex 11, R's Ex 5 and 6 (Notice of Apparent Noncompliance Letter from Dennis Fewless to Respondent, and Respondent's response thereto); R's Ex 7 (Department of Health fax note to Respondent's attorney). It cannot be concluded that testimony of the State witnesses as to what transpired between Respondent and the Department after the inspection is clearly inadmissible for any purpose.

Complainant has not provided any support for its argument that testimony of any State employees is waived where the State does not submit comments in the notice-and-comment process of CWA § 309(g)(1)(A). The local concerns proposed by the EPA as testimony in

Strong Steel Products, which were not excluded on a motion in limine, were related to the particular site at issue, and included proposed testimony of former city employee that scrap and junkyards were a primary concern for city and State regulatory agencies, and that the respondent's scrap site was one of significant environmental concern. While the local concerns at issue here may of a different type from those in *Strong Steel*, it cannot be said at this point in the proceeding that the local concerns, and other testimony of the State witnesses pertaining to what transpired between Respondent and the Department of Health after the inspection, are clearly inadmissible as to the nature, extent, circumstances and/or gravity of the violations, culpability of Respondent, or other factors as justice may require, or in rebuttal to Complainant's case.

D. State Consultation and Reaction to EPA's Proposed Penalty

Fourth, Complainant seeks to exclude testimony of the State witnesses pertaining to EPA's "consultation" with the Department of Health and as to C's Exs 23, 27, 28, and 29 as being irrelevant, immaterial and of little or no probative value. Complainant points out that Respondent seeks to present testimony as to what the consultation consisted of and how shocked the North Dakota Department of Health was when it learned that EPA was seeking an $80,000 penalty against Respondent. Complainant asserts that it met the requirement of CWA Section 309(g)(1)(A) for EPA to assess a penalty "after consultation with the State in which the violation occurs" by sending a copy of the Complaint to the North Dakota Department of Health. Complainant asserts further that it complied with the requirement of CWA Section 309(g)(4) to provide public notice of the proposed penalty and opportunity for public comment prior to assessing a penalty, and that the State of North Dakota did not submit a comment. Complainant asserts that the obligation to consult with the State does not require the State to agree to the filing of an enforcement action or to the proposed penalty. Therefore, Complainant argues, testimony of the State witnesses as to Complainant's Penalty Justification (C's Ex 23), as to e-mail regarding EPA's intent to move forward with enforcement in this matter (C's Ex 27), and as to Tables of Cases provided by EPA to the North Dakota Department of Health during the consultation (C's Exs 28, 29), is irrelevant, immaterial, and of no probative value.

Respondent did not address this issue in its Opposition. As noted above, enforcement actions taken, and priorities and policies followed by a State agency, such as the Department of Health, may differ from those of EPA. The content of any consultation between the Department of Health and EPA, and any reaction or opinion of the Department concerning the penalty proposed by EPA, does not appear to be relevant to any statutory penalty determination factor. Therefore, such testimony is clearly inadmissible.

ORDER

1. Complainant's Motion for Substitution of Complainant's Exhibit 23 and Amendment to the Prehearing Exchange is **GRANTED.**

2. Complainant's Motion to Compel Additional Discovery for the Statutory Factor Ability to Pay, or in the Alternative, Motion to Preclude Respondent from Offering Any Evidence of its Inability to Pay at Hearing is **DENIED as moot.**

3. Respondent's Motion to Exclude Rebuttal Evidence is **DENIED.**

4. Respondent's Motion to Supplement Its Prehearing Exchange to Add Dennis Walaker as a Witness is **GRANTED.** Respondent shall, **on or before March 28, 2006,** file a supplement to its Prehearing Exchange stating either that Mr. Walaker is a proposed fact witness and summarizing the facts to which he is expected to testify, or stating that Mr. Walaker is a proposed expert witness, summarizing the proposed testimony, and providing his resume or curriculum vitae.

5. Complainant's Motion in Limine to Exclude Dennis Walaker's testimony is **DENIED.**

6. Complainant's December 15, 2005 Motion in Limine to Exclude Testimony and Documents Listed in Respondent's Prehearing Exchange is **DENIED**, except with respect to testimony regarding any consultation between the North Dakota Department of Health and EPA, or regarding any reaction of the Department of Health to the proposed penalty, which testimony shall be excluded.

_____

Susan L. Biro
Chief Administrative Law Judge

Dated: March 17, 2006
Washington, D.C.